

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

Constitution Alteration (Advisory Jurisdiction of
High Court) Bill 1983

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General Senator
the Hon. Gareth Evans)

OUTLINE

The purpose of the Bill is to enable the Commonwealth and State Governments and a Territory Government to obtain advisory opinions from the High Court on specified types of questions.

The Bill is so framed as to confine the jurisdiction to cases of enactments actually passed or already before a Commonwealth or State Parliament, or a Territory legislature, and to certain other constitutional or treaty questions that have actually arisen or are reasonably likely to arise.

The Commonwealth State or Territory Government concerned may only seek an advisory opinion on the validity of an enactment or proposed enactment passed by or before its own Parliament or legislature.

NOTES ON CLAUSES

Clause 1 - This is a formal provision specifying the short title of the Act.

Clause 2 - Advisory Jurisdiction

This clause inserts a new provision in the Constitution, section 77A, which confers an advisory jurisdiction on the High Court.

Sub-Clause (1) enables the Commonwealth Government to obtain an opinion from the High Court on a number of specified matters. In formal terms a reference will be initiated by the Governor-General in Council.

The matters on which the Commonwealth Government may obtain an opinion are questions of law as to the validity of a Commonwealth Act or Bill and questions of law that the Governor-General in Council is of opinion have arisen or are reasonably likely to arise concerning:

- the interpretation of ss.57 (double dissolutions and joint sittings), 121 (admission of new States), 122 (territories), 123 (alteration of limits of States), 124 (formation of new States) and 128 (referendums);
- the interpretation or application of ss.44 or 45 (disqualification of members and Senators) but only with the consent, or at the request of the relevant House of the Parliament; and
- the interpretation of any treaty and legislation to implement a treaty.

Sub-Clause (2) enables a State Government or a Territory Government to obtain an advisory opinion on any question of law as to -

- the validity of an Act of that State or of the Territory;
- the validity of a Bill that is before the Parliament of the State or Territory; or

- the 'manner and form' required for the passing of that State's or Territory's legislation (requirements as to 'manner and form' of legislation are imposed by State Constitutions). The provision will apply to any Territory that has an Administrator and an Executive Council.

Sub-Clause (3) enables the Government that makes a reference to specify facts or circumstances that are to be assumed by the High Court in dealing with the questions, thus ensuring that opinions are not given in a vacuum.

Sub-Clause (4) ensures that argument is heard in public, that reasons are made public and that the Attorneys-General of the Commonwealth and the States have a right to be heard; the Attorney-General of a Territory is given a right to be heard on a matter referred by his Government and on questions involving the admission of new States (s.121) and the territories power (s.122).

Sub-Clause (5) ensures that a court from which an advisory opinion is sought is constituted by at least five Justices.

Sub-Clause (6) enables a reference to be amended after it has been made.

Sub-Clause (7) defines various terms used in the provision. In particular, 'Parliament', in relation to a Territory, is defined in such a way as to take account of the different kinds of legislatures that may be consistent with self-government and 'treaty' is defined to include any international agreement between nation States.